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20 UNITED STATES DISTRICT COURT

21 NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

22 In re: CATHODE RAY TUBE (CRT)
23 ANTITRUST LITIGATION

Case No. Master File No. 3:07-md-05944-SC
MDL NO. 1917

24 This Document Relates to:

25 *Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,*
No. 11-cv-05513

26 *Best Buy Co., et al. v. Technicolor SA, et al.,*
27 No. 13-cv-05264

28 *Sears, Roebuck and Co. and Kmart Corp. v.*

**DEFENDANTS' MOTION IN LIMINE #16:
TO PERMIT EVIDENCE AND
ARGUMENT REGARDING UPSTREAM
PASS-ON AND PLAINTIFFS'
BARGAINING POWER [REDACTED]**

Judge: Hon. Samuel Conti
Date: None Set
Ctmm: 1, 17th Floor

3:07-cv-05944-SC; MDL 1917

DEFS' MOT. IN LIMINE #16: TO PERMIT EVIDENCE AND ARGUMENT REGARDING UPSTREAM PASS-ON
AND PLAINTIFFS' BARGAINING POWER

1 *Technicolor SA*, No. 3:13-cv-05262

2 *Sears, Roebuck and Co. and Kmart Corp. v.*
3 *Chunghwa Picture Tubes, Ltd.*, No. 11-cv-
05514

4 *Sharp Electronics Corp., et al. v. Hitachi Ltd.,*
5 *et al.*, No. 13-cv-1173

6 *Sharp Electronics Corp., et al. v. Koninklijke*
7 *Philips Elecs., N.V., et al.*, No. 13-cv-2776

8 *Siegel v. Hitachi, Ltd.*, No. 11-cv-05502

9 *Siegel v. Technicolor SA*, No. 13-cv-05261

10 *Target Corp. v. Chunghwa Picture Tubes,*
11 *Ltd.*, No. 11-cv-05514

12 *Target Corp. v. Technicolor SA*, No. 13-cv-
05686

13 *ViewSonic Corporation v. Chunghwa Picture*
14 *Tubes Ltd.*, No. 14-cv-2510

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3:07-cv-05944-SC; MDL 1917

NOTICE OF MOTION AND MOTION

TO THE COURT, THE CLERK, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that as soon as the matter may be heard, in Courtroom 1, 17th Floor, 450 Golden Gate Avenue, San Francisco, California, before the Honorable Samuel Conti, the undersigned defendants (“Defendants”)¹ will and hereby do move the Court to permit evidence and argument regarding upstream pass-on and Plaintiffs’ bargaining power, for the reasons set forth in the accompanying Memorandum of Points and Authorities.

This motion is based upon this Notice of Motion, the accompanying Memorandum of Points and Authorities in support thereof, the complete files and records in this action, oral argument of counsel, and such other and further matters as this Court may consider.

MEMORANDUM OF POINTS AND AUTHORITIES

All but one of the Plaintiffs never purchased any “cathode ray tubes” (“CRTs”), the components that are the focus of this case and that Plaintiffs allege were price-fixed. Instead, Plaintiffs purchased finished products – televisions and/or monitors that contained CRTs. But before Plaintiffs purchased those finished products, the CRTs had already been sold by Defendants to companies that manufactured televisions and monitors using the CRTs. There is no claim of price fixing on the finished televisions and monitors. Given the nature of Plaintiffs’ claims, “upstream pass-on” evidence – that is, evidence establishing that the alleged CRT overcharge, if any, was passed on to Plaintiffs in the prices they paid for finished products – will be essential to the jury’s determination concerning whether Plaintiffs were harmed and, if so, what are the accurate damages in this case.

Nonetheless, Plaintiffs have indicated that they intend to move to exclude upstream pass-on evidence from being presented to the jury. In other words, Plaintiffs seek to recover billions of dollars in damages while excusing themselves of the requirement of proving that they were harmed, and preventing the jury from hearing evidence that, due to Plaintiffs’ bargaining power as

¹ Each Defendant moves only as to the cases in which it remains active.

1 national retailers and manufacturers, only a fraction of any overcharges were actually passed on to
2 Plaintiffs.

3 Plaintiffs are expected to argue that evidence of upstream pass-on is precluded by *Royal*
4 *Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980) (“*Royal Printing*”). Any such
5 argument ignores the fact that the subsequently-enacted Foreign Trade Antitrust Improvements
6 Act (“FTAIA”) explicitly requires that Plaintiffs demonstrate an “effect” in the United States of
7 the foreign price fixing conduct upon which they rely. There can be no domestic “effect” without
8 pass-on, and Plaintiffs cannot satisfy the requirements of the FTAIA without presenting evidence
9 regarding upstream pass-on of the overcharge in this case.

10 *Royal Printing* does not set forth a blanket holding that upstream pass-on evidence can
11 never be admitted; it simply held that indirect purchasers were permitted to sue for the entire
12 overcharge amount where they purchased the actual price-fixed goods from wholly-owned
13 subsidiaries of the defendants. *Id.* at 327. But *Royal Printing* did not address the admissibility of
14 upstream pass-on evidence in a component case such as this one, where the only way the Plaintiffs
15 can show an antitrust injury at all is to prove the prices they paid were affected by the price-fixing
16 of the component. Nor did it address in any way the requirements established by the FTAIA. As
17 such, *Royal Printing* does not bar upstream pass-on evidence that is independently relevant.

18 Here, evidence of upstream pass-on is relevant on at least four separate grounds, including
19 for purposes of (1) proving the elements of a Sherman Act claim in light of the FTAIA, (2)
20 addressing express overcharge pass-through assumptions made by Plaintiffs’ damages expert; (3)
21 contesting whether Plaintiffs have established a viable antitrust injury; and (4) rebutting damages
22 figures for Plaintiff Best Buy’s claims under Minnesota law. Accordingly, evidence and argument
23 regarding upstream pass-on should be admitted at trial.

24 **I. Evidence of Upstream Pass-On Is Required to Satisfy the FTAIA**

25 In 1982, Congress enacted the FTAIA to “respon[d] to concerns regarding the scope of the
26 broad jurisdictional language in the Sherman Act.” *In re Dynamic Random Access Memory*
27 *(DRAM) Antitrust Litig.*, 546 F.3d 981, 985 (9th Cir. 2008). The FTAIA was designed to prevent
28 “unreasonable interference with the sovereign authority of other nations,” and avoid “creating

friction with many foreign countries and resentment at the apparent effort of the United States to act as the world's competition police officer.” *Motorola Mobility LLC, v. AU Optronics Corp.*, --- F.3d---, 2015 WL 137907, at *9 (7th Cir. Jan. 12, 2015) (internal quotation marks and citations omitted). Under the FTAIA, foreign conduct, which is not import trade, is not subject to the Sherman Act unless (1) “such conduct has a direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce, and (2) such effect “gives rise” to a plaintiff’s claim. *See* 15 U.S.C. § 6a (1)(2). This limited carve-out is generally referred to as the “domestic effects exception” of the FTAIA.

The FTAIA is not jurisdictional, but rather goes directly to the merits of an antitrust claim by “provid[ing] substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations.” *United States v. Hui Hsiung*, ---F.3d---, 2015 WL 400550, at *11 (9th Cir. Jan. 30, 2015). Thus, Plaintiffs seeking to bring a Sherman Act claim have the burden of establishing that the “domestic effects exception” applies: “[W]hen a case involves nonimport trade with foreign nations, the Sherman Act does not apply unless the FTAIA domestic effects exception applies.” *Id.* at *15.

The vast majority of the CRT transactions at issue in this case were foreign transactions, rather than import or domestic commerce, which need not satisfy the “domestic effects exception.” The parties have filed numerous motions for summary judgment regarding issues governed by the FTAIA.² As to any claims that survive summary judgment, Plaintiffs will have the burden of proving that the foreign CRT transactions at issue had a “direct, substantial, and reasonably foreseeable effect” on U.S. trade or commerce, and that such effect “gives rise” to Plaintiffs claim. *See* 15 U.S.C. § 6a. Because all but one of the plaintiffs never purchased CRTs, but instead purchased only finished televisions and monitors *after* the allegedly overcharged CRTs had first

² (*See* Defendants’ Joint Notice of Motion and Motion for Summary Judgment Based on Plaintiffs’ Failure to Distinguish Between Actionable and Non-Actionable Damages Under the FTAIA, Dec. 7, 2014, ECF No. 3008; LGE Defendants’ Notice of Motion and Motion for Partial Summary Judgment on FTAIA Grounds; Memorandum of Points and Authorities In Support Thereof, Dec. 7, 2014, ECF No. 3032; LGE Defendants’ Notice of Motion and Motion for Partial Summary Judgment on Standing Grounds; Memorandum of Points and Authorities In Support Thereof, Dec. 7, 2014, ECF No. 3035.)

1 been sold to television and monitor manufacturers, plaintiffs will necessarily need to present
2 upstream pass-on evidence in order to prove any “effect” on U.S. commerce.

3 Defendants, on the other hand, intend to demonstrate to the jury that plaintiffs cannot
4 satisfy their burden of satisfying the FTAIA’s “domestic effects exception” because, among other
5 things, the foreign CRT transactions did not have a “direct” or “substantial” effect on U.S.
6 commerce. For purposes of the FTAIA, the Ninth Circuit has explained that “an effect is ‘direct’
7 if it follows as an immediate consequence of the defendant’s activity,” and that “[a]n effect cannot
8 be ‘direct’ where it depends on . . . uncertain intervening developments.” *United States v. LSL*
9 *Biotechnologies*, 379 F.3d 672, 680-81 (9th Cir. 2004); *see also Hui Hsiung*, 2015 WL 400550, at
10 *17 (same).

11 Whether or not plaintiffs have proven a “direct, substantial, and reasonably foreseeable
12 effect” sufficient to satisfy the FTAIA’s “domestic effects exception” is a question of fact. For
13 instance, in *Hui Hsiung*, the Ninth Circuit analyzed the FTAIA’s “direct” effect requirement under
14 a sufficiency of the evidence standard, considering “whether any rational trier of fact could have
15 found the essential elements of the crime beyond a reasonable doubt.” *Hui Hsiung*, 2015 WL
16 400550 at *17 (citation omitted). In finding that sufficient evidence had been presented to the jury
17 on the “direct” requirement, the court relied, in part, upon testimony that if the component “price
18 goes up, then it will directly impact” the price of the finished product sold in the United States,
19 and the court pointed to evidence about “direct negotiations” with United States companies. *Id.*
20 (internal quotation marks omitted). Similarly, the Second Circuit has stated that deciding whether
21 a domestic effect “is sufficiently ‘direct’ under the FTAIA will depend on many factors, including
22 the structure of the market and the nature of the commercial relationships *at each link in the*
23 *causal chain.*” *Lotes Co. v. Hon Hai Precision Indus. Co.*, 753 F.3d 395, 413 (2d Cir. 2014)
24 (emphasis added).

25 Evidence regarding upstream pass-on, including evidence of Plaintiffs’ strong bargaining
26 power and of the significant competition within the finished television and monitor market, will be
27 essential to proving that foreign CRT transactions did not have a “direct” or “substantial” effect on
28 U.S. commerce. Pass on decisions are the result of a variety of sometimes complex economic

1 factors, which affect the degree to which an “effect” is “direct” or “substantial.” The fact that
 2 Plaintiffs – who, due to their size and large market share, wielded enormous bargaining power –
 3 could dictate pricing and largely prevent any overcharges from being passed on to them is
 4 important for demonstrating the lack of any “direct” or “substantial” effect. If plaintiffs could
 5 fend off overcharges, or if competition in the finished television or monitor market prevented any
 6 CRT overcharge from being incorporated into the price of the finished products Plaintiffs
 7 purchased, the alleged CRT price fixing would not have had an “immediate consequence” on U.S.
 8 commerce. *See LSL Biotechnologies*, 379 F.3d at 680-81. Further, the impact of Plaintiffs
 9 bargaining power and the balance of the other factors that drive pass-on decisions mean that any
 10 effect was subject to “uncertain intervening developments.” *See id.* Upstream pass-on evidence,
 11 therefore, goes directly to a central issue of fact in this case: whether or not the foreign CRT
 12 transactions had a “direct” or “substantial” effect on U.S. commerce.³

13 Because upstream pass-on evidence is necessary for the jury to resolve whether plaintiffs
 14 can satisfy the FTAIA’s “domestic effects exception,” and, thus, whether plaintiffs can prove their
 15 Sherman Act claim, this evidence should be admitted at trial.

16 **II. Defendants Must Be Able to Introduce Evidence of Upstream Pass-On to Challenge**
 17 **the Methodology of Plaintiffs’ Damages Calculations**

18 Evidence of upstream pass-on is also integral to challenging Plaintiffs’ damages estimates.
 19 Dr. Alan Frankel, Plaintiffs’ damages calculation expert, specifically considered [REDACTED]

20 [REDACTED]
 21 [REDACTED]
 22 [REDACTED]
 23 [REDACTED]

24 ³ The relevance of upstream pass-on evidence to the FTAIA analysis is further seen in the Seventh
 25 Circuit’s determination in *Motorola* that the plaintiff had failed to satisfy the “give rise to” prong
 26 of the FTAIA’s “domestic effects exception” in part because of the “remarkable dearth of
 27 evidence from which to infer harm to Motorola.” The court faulted the plaintiff for pleading that
 28 “it paid more for cellphones that it purchased from its subsidiaries” as a result of the price-fixing
 of LCD panels, without providing evidence “to estimate the increase in the price paid by Motorola
 for finished cellphones.” *Motorola*, 2015 WL 137907 at *6-*8.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]
 7 [REDACTED]
 8 [REDACTED]
 9 [REDACTED]
 10 [REDACTED]

11 Dr. Frankel's analysis of the pass-through rate is essential both to evaluating his damages
 12 calculations and to weighing his credibility as a witness. Dr. Frankel's findings regarding the
 13 pass-through rate [REDACTED]

14 [REDACTED] There is defense expert testimony in this
 15 case that the pass-through rate was, in fact, no more than between 60% and 70%, [REDACTED]
 16 [REDACTED] This contrary evidence is relevant to the jury's accurate
 17 assessment of Dr. Frankel's analysis. Indeed, to allow Dr. Frankel to present his damages
 18 testimony without allowing evidence about upstream pass-on would allow a bedrock – and deeply
 19 flawed – predicate of his damages calculations to go untested. In order to realistically defend this
 20 case and address express findings made by Plaintiffs' damages expert, Defendants should be
 21 allowed to present the jury with evidence regarding the lack of upstream pass-on.

22 **III. Upstream Pass-On Evidence Is Necessary to Address Whether Plaintiffs Have**
 23 **Established Antitrust Injury**

24 Upstream pass-on evidence is also relevant to Plaintiffs' ability to establish a viable
 25 antitrust injury. The Supreme Court has instructed "that Congress did not intend the antitrust laws
 26 to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust
 27 violation." *Associated Gen. Contractors of Cal. v. Cal. State Council of Carpenters*, 459 U.S.
 28 519, 534 (1983) ("AGC") (internal quotation marks and citation omitted). A plaintiff, therefore,

1 “may only pursue an antitrust action if it can show ‘antitrust injury, which is to say injury of the
 2 type the antitrust laws were intended to prevent and that flows from that which makes defendants’
 3 acts unlawful.’” *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999)
 4 (quoting *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 334 (1990)). In determining
 5 whether a plaintiff has demonstrated antitrust standing, the Supreme Court in *AGC* identified the
 6 following relevant factors: “(1) the nature of the plaintiff’s alleged injury; that is, whether it was
 7 the type the antitrust laws were intended to forestall”; “(2) the directness of the injury”; “(3) the
 8 speculative measure of the harm”; “(4) the risk of duplicative recovery”; and “(5) the complexity
 9 in apportioning damages.” *See Am. Ad Mgmt.*, 190 F.3d at 1054. The first factor, “the nature of
 10 the plaintiff’s alleged injury,” is given “great weight.” *Id.* at 1055.

11 With regard to the first factor, the Ninth Circuit has held that proving antitrust injury
 12 “requires, as a corollary, that the injured party be a participant in the same market as the alleged
 13 malefactors.” *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470 (9th Cir. 1985). “In other words,
 14 the party alleging the injury must be either a consumer of the alleged violator’s goods or services
 15 or a competitor of the alleged violator in the restrained market.” *Eagle v. Star-Kist Foods, Inc.*,
 16 812 F.2d 538, 540 (9th Cir. 1987); *see also Ass’n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*,
 17 241 F.3d 696, 704-05 (9th Cir. 2001) (holding that hospitals harmed by tobacco companies had
 18 suffered harm in a different market from the nicotine delivery market and therefore had failed to
 19 demonstrate antitrust injury). As discussed above, however, Plaintiffs were not participants in the
 20 CRT market – they were neither “consumers” of CRTs nor “competitors” of the CRT
 21 manufacturers. Indeed, all but one plaintiff never even purchased any CRTs. Rather, plaintiffs
 22 purchased finished products that contained CRTs, and did so only after the CRTs had first been
 23 purchased by television and monitor manufacturers, which occurred in an entirely separate market.

24 Some courts have allowed plaintiffs to circumvent the “same market” requirement for
 25 antitrust standing in component cases by proving that the market in which they purchased – here,
 26 finished CRT products – was “inextricably linked” with the market from which the conspiracy
 27 occurred and that the price-fixing of the components “affect[ed]” the prices of the finished
 28 products. *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1122-1123

(N.D. Cal. 2008) (finding standing had been sufficiently pled based on claim that “changes in the prices paid by direct purchasers of LCD panels affect prices paid by indirect purchasers of products containing LCD panels”); *see also In re Auto. Parts Litig.*, Nos. 12-MD-02311, 2:12-CV-00502, 2:12-CV-00503, 2014 WL 4793848 (E.D. Mich. Sept. 25, 2014) (plaintiffs challenging price-fixing of automotive bearings adequately alleged “economic injury because the overcharges *affected* the price of vehicles containing” these components (emphasis added)). Indeed, Plaintiffs relied on the *In re TFT-LCD* decision in their opposition to Defendants’ motion for summary judgment regarding antitrust injury.⁴ In the event that the Court denies summary judgment here and concludes that Plaintiffs’ claims should proceed to trial, Plaintiffs will have to *prove* their economic injury by showing that overcharges on CRTs were passed on to them by the television and monitor manufacturers – in other words, they will have to present upstream pass-on evidence, and defendants must be allowed to rebut it.

Upstream pass-on evidence, therefore, will be relevant at trial to determining whether plaintiffs have proven an antitrust injury. In fact, without evidence of upstream pass-on, plaintiffs will have failed to establish any antitrust injury and their claims would have to be dismissed. *See Bhan*, 772 F.2d at 1470. Under these circumstances, Defendants are entitled to rebut Plaintiffs’ upstream pass-on evidence by demonstrating that Plaintiffs possessed bargaining strength that limited the ability of television and monitor manufacturers to pass on any overcharges. Such evidence will directly address whether Plaintiffs have, in fact, suffered a viable antitrust injury and thus whether they have standing to pursue these claims at all.

IV. Upstream Pass-On Evidence Is Relevant to Best Buy’s State Law Claims

Plaintiff Best Buy has maintained its claim for indirect damages under Minnesota state law. (*See Best Buy First Am. Compl.*, Oct. 3, 2013, ECF No. 1978, ¶¶ 243-49 (citing Minnesota Antitrust Act of 1971, Stat. § 326D.52, *et seq.*)) Minnesota’s antitrust statute provides that a plaintiff’s recovery should be based on “the actual damages sustained,” such that “the court may

⁴ (*See Indirect Purchaser and Certain Direct Action Pls.’ Opp’n to Defs.’ Joint Mot. for Partial Summ. J. for Lack of Antitrust Injury*, at 2 & n.4, Jan. 23, 2015, ECF No. 3254.)

1 take ‘any steps necessary to avoid duplicative recovery against a defendant.’” *Lorix v. Crompton*
 2 *Corp.*, 736 N.W.2d 619, 623 (Minn. 2007) (quoting Minn. Stat. § 35D.57). In order to determine
 3 “the actual damages sustained,” Minn. Stat. § 35D.57, the jury must be able to consider evidence
 4 of upstream pass-on and the bargaining power of purchasers so that the jury can determine how
 5 the overcharge was apportioned among the various entities in the distribution chain. *See Lorix*,
 6 736 N.W.2d at 628 (“By expressly permitting indirect purchaser suits, our legislature has rejected
 7 the notion that Minnesota courts are not to be burdened with the complex apportionment inherent
 8 in those suits.”). Thus, courts have “conclude[d] that allowing a pass-on defense is consistent with
 9 the Minnesota Antitrust Act because plaintiffs will recover their ‘actual damages sustained.’” *See*
 10 *In re TFT-LCD (Flat Panel) Antitrust Litigation*, No. M 07–1827 SI, 2012 WL 6709621, at *7
 11 (N.D. Cal. Dec. 26. 2012) (quoting Minn. Stat. § 352D.57).

12 Therefore, under the law that governs Plaintiff Best Buy’s indirect damages claim,
 13 upstream pass-on evidence must be admitted.⁵

14 * * *

15 For the forgoing reasons, Defendants respectfully request that this Court grant Defendants’
 16 motion *in limine* to permit evidence and argument regarding upstream pass-on and Plaintiffs’
 17 bargaining power.

18
 19 Dated: February 13, 2015 Respectfully submitted,

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27
 28 ⁵ Upstream pass-on evidence is also relevant to the Indirect Purchase Plaintiffs’ state law claims.

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